

**United States Department of Labor
Employees' Compensation Appeals Board**

P.D., Appellant

and

**DEPARTMENT OF TRANSPORTATION,
U.S. MERCHANT MARINE ACADEMY,
Kings Point, NY, Employer**

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**Docket No. 18-1461
Issued: July 2, 2019**

Appearances:

James D. Muirhead, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On July 23, 2018 appellant, through counsel, filed a timely appeal from a July 5, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish lumbar conditions causally related to the accepted November 16, 2015 employment incident.

FACTUAL HISTORY

On November 16, 2015 appellant, then a 58-year-old mason, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained an injury to his lower back and right leg when lifting and removing scaffolding while in the performance of duty. He stopped work that same day. On the reverse side of the claim form appellant's supervisor checked a box marked "yes" indicating that appellant was injured in performance of duty.

In a November 11, 2015 report, Dr. Hervey Sicherman, a Board-certified orthopedic surgeon, noted that appellant was seen two weeks prior with a history of lower back pain and pain radiating in the right sciatic distribution. He indicated that he had advised appellant not to work as a mason; however, appellant returned to work on a modified-duty schedule. Dr. Sicherman ordered a magnetic resonance imaging (MRI) scan. He diagnosed lumbago with sciatica and other intervertebral disc degeneration.

In a November 16, 2015 report, Dr. Sicherman advised that appellant had persistent lower back pain with right sciatica. He noted that appellant had lifted something at work that day and had a marked increase in lower back pain, especially distal right lower extremity pain with lateral distal calf and ankle pain. Dr. Sicherman diagnosed low back pain, lumbago with sciatica, on the right side, and other intervertebral disc degeneration, lumbosacral region. He provided a work excuse, also dated November 16, 2015, with an estimated return to work date of November 24, 2015.

A November 19, 2015 magnetic resonance imaging (MRI) scan of appellant's lumbar spine read by Dr. Daniel Levy, a Board-certified diagnostic radiologist, revealed L5-S1 disc protrusion on the left and mild facet arthropathy in the lower lumbosacral spine.

In a November 23, 2015 report, Dr. Sicherman noted that, when appellant returned to work, he had a marked increase of pain. He indicated that he advised appellant not to work as a mason. Dr. Sicherman examined appellant and diagnosed low back pain, lumbago with sciatica on the right side, and other intervertebral disc degeneration.

In the attending physician's report portion (Part B) of a November 23, 2015 authorization for evaluation and/or treatment (Form CA-16), Dr. Sicherman indicated that appellant had injured his lower back and right leg, as he had pulled a muscle which caused sciatica. He again noted that appellant had increased back pain after lifting something at work. Dr. Sicherman marked the box "yes" in response to whether appellant had any history or evidence of a concurrent or preexisting injury and noted: "sciatic pain in the past." He also marked the box "yes" in response to whether he believed the condition found was caused or aggravated by the employment activity described. Dr. Sicherman indicated that appellant was totally disabled from work for the period November 23 to December 22, 2015.

Dr. Sicherman provided a December 21, 2015 work excuse note, placing appellant off work for two weeks. In a December 21, 2015 report, he reiterated that appellant had been doing

well until a couple of days prior when he developed right lower back and buttock pain with radiation to the right anterior thigh. Dr. Sicherman also noted pain in the left lower back and posterior thigh. He explained that he was treating appellant for lower back pain with right sciatica. Dr. Sicherman noted the findings from appellant's MRI scan and recommended physical therapy. He diagnosed other intervertebral disc displacement, lumbosacral, low back pain, lumbago with sciatica on the right side, and other intervertebral disc degeneration, lumbosacral region. Dr. Sicherman continued to hold appellant off work.

In a report dated December 28, 2015, Dr. Richard S. Rosenberg, a Board-certified internist and neurologist, noted appellant's history of lower back pain "at least since early October for which he sought some treatment." He explained that on November 16, 2015 appellant was at work moving scaffolding. Dr. Rosenberg had a sudden onset of severe pain in the lower back which began to radiate down the anterior aspect of the right thigh and down the anteromedial aspect of the right calf to the foot. He advised that appellant's November 18, 2015 lumbar MRI scan revealed minimal disc bulging at L4-5 and a small broad disc protrusion extending into the left neural foramen at L5-S1.

Dr. Rosenberg also noted that a few weeks prior, appellant had an episode of twitching of the muscles of the right thigh and then generalized pain in both legs lasting for one to two days without any specific provocation. He noted that appellant indicated the pain in the left leg subsided after a day or two and was only occasional since then, and not severe. Dr. Rosenberg indicated that most of the pain remained in the lower back, buttock, anterior right thigh and anterior right shin. He explained that appellant had right sciatica and lower back pain for which there was no corresponding disc herniation shown on the recent MRI scan of the lumbar spine. Dr. Rosenberg also noted that appellant had occasional spasms in the left leg, but no definite sciatica to correspond with the small left-sided L5-S1 disc herniation.

In a January 5, 2016 report, Dr. Sicherman repeated his diagnoses. He also provided a January 5, 2016 work excuse note advising that appellant could perform light-duty work for one week. Dr. Sicherman saw appellant on February 4, 2016 and noted that appellant was doing well without any symptoms. He also noted that appellant had been working for the past month without any discomfort. Regarding his lumbago and sciatica on the right side, Dr. Sicherman explained that there was a lack of correlation between the MRI scan findings and appellant's symptoms and a neurological evaluation was warranted. He also noted that appellant may have future problems with intervertebral disc degeneration.

In a development letter dated August 5, 2016, OWCP advised appellant that when his claim was first opened it appeared to be a minor injury that resulted in minimal or no lost time from work and the employing establishment did not controvert the claim. However, the claim was reopened because the medical bills exceeded \$1,500.00. OWCP informed appellant of the type of factual and medical evidence needed to support his claim and afforded him 30 days to submit the necessary evidence.

In an August 29, 2016 report, Dr. Sicherman noted that appellant was last seen in February 2016. He related that appellant continued to work with good days and bad days. Dr. Sicherman advised that heavy work caused appellant to have lower back pain, but he continued to work.

In an August 29, 2016 response to the development questionnaire, appellant explained that he previously thought he had pulled a muscle prior to the claimed employment incident. He noted that he sought treatment and felt well enough to return to work. Appellant explained that he noted pain and a pull in his back on November 16, 2015. In a September 2, 2016 statement, he alleged that his physician believed that the November 16, 2015 employment incident permanently aggravated his lumbar condition.

In a report dated September 27, 2016, Dr. Sicherman advised that he initially believed that appellant's pain was secondary to his degenerative lumbar disc disease. He noted that the incident at work caused appellant's symptoms to "markedly increase" and explained that an MRI scan of appellant's lumbar spine was consistent with a disc herniation and degenerative changes. Dr. Sicherman explained that appellant's symptoms subsided and he had returned to work. Since that time, appellant had persistent symptoms in the lower back and right lower extremity, which were secondary to a bulging/herniated disc. He opined that the "disc condition is causally related to the incident at work and aggravated previously asymptomatic degenerative lumbar disc disease." Dr. Sicherman explained the need for epidural lumbar injections due to the herniated disc and bulging disc which were "directly related to the incident at work."

By decision dated October 18, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the medical conditions of other intervertebral disc displacement of the lumbosacral region, other intervertebral disc degeneration of the lumbosacral region, sciatica of the right side, and disc herniation were caused or aggravated by the accepted November 16, 2015 employment incident.

By letter postmarked on October 26, 2016, appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on May 10, 2017.

OWCP subsequently received a May 25, 2017 report, wherein Dr. Sicherman noted that appellant initially presented to him with lower back pain and pain down the right lower extremity. He explained that there was a subsequent aggravation at work and his symptoms persisted. Dr. Sicherman indicated that appellant initially responded to treatment and returned to work with occasional pain, but later in 2016 he had marked increase in symptoms that did not respond to appropriate epidural injections. He opined that "this was an injury and/or condition that was aggravated by his work. It accelerated and aggravated the preexisting condition. The permanence is related to the work." Dr. Sicherman related that he understood that appellant had recently undergone lumbar fusion and instrumentation, which "was a direct result of the aggravation at work." He opined that appellant was not able to continue working as a mason because of the stressful physical requirements.

By decision dated July 24, 2017, OWCP's hearing representative affirmed the October 18, 2016 decision.

On September 12, 2017 counsel provided OWCP with a copy of the November 19, 2015 MRI scan.

On April 11, 2018 appellant, through counsel, requested reconsideration and submitted an undated report from Dr. Steven Ferrer, a pain medicine specialist.

Dr. Ferrer noted that appellant had been under his care since September 26, 2016. He noted appellant's history of injury and treatment, and indicated that appellant's symptoms began in late 2015. Dr. Ferrer noted that, at that time, appellant began experiencing low back pain radiating down the right lower extremity after an employment incident that occurred while removing scaffolding. He related that, over the next few months, appellant's "symptoms remitted significantly with physical therapy and rest."

Dr. Ferrer noted that appellant sustained a new low back injury while at work on September 8, 2016, while removing 20-pound plaques off of a wall. He advised that an MRI scan from September 17, 2016 was reportedly stable compared to his prior MRI scan from November 18, 2015. Dr. Ferrer also noted that, following additional treatment, appellant returned to work. He noted that conservative treatment was not ameliorating the conditions and as a result appellant underwent lumbar surgery. Dr. Ferrer diagnosed lumbar radiculopathy and low back pain. He opined that appellant was disabled from work and that his condition was permanent.

Dr. Ferrer indicated that he had reviewed appellant's job responsibilities, and opined that "it is likely that these duties precipitated his lumbar spinal injuries that prompted the need for medical and surgical treatments." He referred to several medical studies and journals regarding the effects of lumbar fusions and changes to the lumbar spine. Dr. Ferrer opined that appellant was no longer able to continue in his occupation as a mason due to numerous biomechanical factors that would lead to further damage to his lumbar spine. He indicated that there was a likelihood that appellant would have "frequent sudden exacerbations" given his job duties.

By decision dated July 5, 2018, OWCP denied modification of the prior decision, finding that the medical evidence of record did not provide a rationalized opinion regarding how the November 16, 2015 employment incident caused or aggravated the diagnosed lumbar spine conditions.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA,⁵ that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁸ The second component is whether the employment incident caused a personal injury.⁹

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹¹

ANALYSIS

The Board finds that appellant has not established lumbar conditions causally related to the accepted November 16, 2015 employment incident.

Dr. Sicherman provided work excuses through January 5, 2016. However, these work excuses do not constitute probative medical evidence because they do not provide a diagnosis and do not offer an explanation as to the cause of appellant's injury.¹² In his reports dated November 11, 16, 23, and December 21, 2015, January 5 and August 29, 2016, Dr. Sicherman provided diagnoses which included low back pain, lumbago with sciatica, and other intervertebral disc degeneration, lumbosacral region. However, he offered no opinion on causal relationship. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹³

In a November 23, 2015 Form CA-16, Dr. Sicherman checked the box marked "yes" in response to whether appellant had a concurrent or preexisting injury and noted "sciatic pain in the past." He also checked the box marked "yes" in response to whether he believed the incident was the cause of the injury. However, the checking of a box "yes" in a form report, without additional explanation or rationale, is not sufficient to establish causal relationship.¹⁴

Dr. Sicherman's February 4, 2016 treatment note was also of limited probative value as he noted that appellant may have future problems with his intervertebral disc degeneration. However, the Board has held that a fear of future injury is not compensable under FECA.¹⁵

⁸ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *G.N.*, Docket No. 18-0403 (issued September 13, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

¹² *Id.*; see also *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ *Calvin E. King*, 51 ECAB 394 (2000); *Linda Thompson*, 51 ECAB 694 (2000).

¹⁵ *I.J.*, 59 ECAB 408 (2008).

In a report dated September 27, 2016, Dr. Sicherman opined that appellant's "disc condition is causally related to the incident at work and aggravated previously asymptomatic degenerative lumbar disc disease." He explained the need for epidural lumbar injections was due to the herniated disc and bulging disc which were "directly related to the incident at work." However, Dr. Sicherman did not explain how he arrived at his conclusion. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition is causally related to an employment incident.¹⁶

In a May 25, 2017 report, Dr. Sicherman opined that "this was an injury and/or condition that was aggravated by his work. It accelerated and aggravated the preexisting condition. The permanence is related to the work." Dr. Sicherman indicated that appellant had undergone lumbar fusion, which was a direct result of the aggravation at work." However, his report again did not contain medical rationale explaining how appellant's medical conditions were causally related to the employment incident.¹⁷ Medical rationale is especially important in a case such as this wherein Dr. Sicherman had previously reported prior to the November 16, 2015 employment incident that appellant had a history of low back pain and right side distribution sciatica. The Board has explained that if a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹⁸ Dr. Sicherman's reports are, therefore, of limited probative value.

Dr. Rosenberg, in a report dated December 28, 2015, noted that appellant had occasional spasms in the left leg, but no definite sciatica to correspond with the small left-sided L5-S1 disc herniation. The Board notes that Dr. Rosenberg offered no opinion on causal relationship. As previously noted, this is especially important as appellant has preexisting back conditions.¹⁹ Dr. Rosenberg's report was, therefore, of no probative value regarding the issue of causal relationship.²⁰

OWCP also received reports from Dr. Ferrer who diagnosed lumbar radiculopathy and low back pain. After reviewing appellant's employment duties, Dr. Ferrer provided only a speculative opinion when he advised that it was "likely that these duties precipitated his lumbar spinal injuries...." The Board has held that speculative and equivocal medical opinions regarding causal

¹⁶ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale describing the relation between work factors and a diagnosed condition/disability).

¹⁷ *Id.*

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013). See *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

¹⁹ *Id.*

²⁰ See *supra* note 13.

relationship have no probative value.²¹ Dr. Ferrer also referenced several medical studies and journals regarding effects of lumbar fusions and changes to the lumbar spine. The Board has held that newspaper clippings, medical texts, and excerpts from publications are of no evidentiary value in establishing a causal relationship between a claimed condition and factors of the employee's federal employment, as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.²² Dr. Ferrer's report failed to provide a well-rationalized explanation as to how and whether the diagnosed conditions are causally related to the November 16, 2015 employment incident.

A November 19, 2015 MRI scan of appellant's lumbar spine was also received. The Board has held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.²³

The Board therefore finds that there is no medical evidence of record which contains a reasoned explanation of how the November 16, 2015 employment incident caused or aggravated appellant's diagnosed conditions. Thus, appellant has not met his burden of proof.²⁴

On appeal counsel contends that the report of Dr. Ferrer was sufficient to establish that appellant sustained a work-related back injury. However, as explained above, the report of Dr. Ferrer was insufficiently rationalized and the Board finds that appellant has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish lumbar conditions causally related to the accepted November 16, 2015 employment incident.

²¹ *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

²² *See D.E.*, Docket No. 07-0027 (issued April 6, 2007).

²³ *See J.S.*, Docket No. 17-1039 (issued October 6, 2017).

²⁴ The employing establishment issued a Form CA-16 to Dr. Sicherman on November 15, 2015. A properly completed CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board